STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of PETROLEUM COMBUSTION INTERNATIONAL, INC. AND MARTIN CAREY, AS OFFICER for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1976 through August 31, 1978.	ORDER DTA Nos. 802080/802081
In the Matter of the Petition of GAS VALUE SERVICE STATIONS, INC. AND MARTIN CAREY, AS OFFICER for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1976 through August 31, 1978.	802082/802083

Upon petitioners' (Petroleum Combustion International, Inc. and Martin Carey, as officer and Gas Value Service Stations, Inc. and Martin Carey, as officer) Notice of Motion for an order to reopen the record of a hearing to allow for the introduction of evidence regarding the matters at issue,[1] and upon the affidavit of Martin J. Carey, sworn to on March 19, 1991, the affirmation of Maxwell Philipson, Esq., made on March 18, 1991, and the affidavit of Charles Hamilton, sworn to on March 11,

1991, and upon the affirmation of Michael B. Infantino, Esq., in opposition to said motion,

[1]Petitioners' notice of motion sought an order overturning the Administrative Law Judge's decision denying petitioners a continuance so that petitioners will have an opportunity to submit evidence regarding the matters at issue. By letter dated March 28, 1991 the Chief Administrative Law Judge deemed petitioners' motion to be a motion to reopen the record.

made on April 15, 1991, the following facts are found and conclusions of law are made.

FINDINGS OF FACT

The hearing in this matter was commenced on December 11, 1986, before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission,[2] Two World Trade Center, New York, New York. Petitioners were represented at the December 11, 1986 hearing by Edwin M. Mulholland, Esq. The Division of Taxation presented two witnesses at the December 11, 1986 hearing: Richard Tortora, an auditor employed by the Division and Richard C. Mackay, an individual involved in the day-to-day operations of Petroleum Combustion International, Inc. and Gas Value Service Stations, Inc. Petitioners' representative elected not to cross-examine the Division's witnesses at that time, but elected instead to wait until the continuation of the hearing to conduct such cross-examination.

Prior to the continuation of the hearing, Mr. Carey terminated his representation by Mr. Mulholland. This termination included Mr. Mulholland's representation of the corporate petitioners. By letter to Mr. Carey dated June 18, 1987, Mr. Mulholland noted that his representation of Mr. Carey and the corporate petitioners was terminated and he advised Mr. Carey to retain new counsel to represent him in this matter. At about the same time, the Tax Appeals Bureau agreed, at Mr. Mulholland's request,

to adjourn the continuation of the hearing, then scheduled for June 16, 1987, to September 2, 1987 in order for Mr. Carey to retain the services of new counsel. For reasons unrelated to this matter, the hearing scheduled for September 2, 1987 was adjourned to October 29, 1987, and Mr. Carey was so advised by letter, dated July 31, 1987, from Daniel J. Ranalli, Supervising Tax Hearing Officer, Tax Appeals Bureau.

On October 29, 1987 at about 9:15 A.M. (the scheduled date and time for the hearing)

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[2]This proceeding was commenced pursuant to Tax Law former § 171 under the authority of the former State Tax Commission and the former Tax Appeals Bureau. Effective September 1, 1987 the Tax Commission was abolished and the administrative hearing processes became the responsibility of the Tax Appeals Tribunal and the Division of Tax Appeals (see L 1987, ch 401).

Mr. Carey appeared at the offices of the Division of Tax Appeals and requested an adjournment to retain new counsel. Mr. Carey stated that he had been unable to retain new counsel since he terminated Mr. Mulholland on or about June 18, 1987 because of person financial difficulties and certain health problems of his wife. The administrative law judge denied Mr. Carey's request. Mr. Carey refused to remain present for the hearing. The administrative law judge advised Mr. Carey that the hearing would be continued whether Mr. Carey remained or not and the hearing was so continued.

The hearing was completed on October 29, 1987. The Division again presented the testimony of Richard Mackay. The Division also presented the testimony of Dwight Richard Howe, a handwriting expert. The Division also requested and was granted an opportunity to file a brief by December 17, 1987, but did not do so.

The administrative law judge's determination was issued on July 8, 1988. Said determination was mailed by certified mail to Mr. Carey at 25 Lloyd Haven Drive, Lloyd Harbor, New York 11724, the address listed on Mr. Carey's petitions filed in this matter. Said determination was returned to the Division of Tax Appeals marked "unknown". The Division of Tax Appeals then searched for a better address for Mr. Carey and remailed the determination, again by certified mail, on August 4, 1988 addressed to Mr. Carey at 5 East 78th Street, New York, New York 10021. The determination was subsequently returned to the Division of Tax Appeals as "unclaimed".

On April 3, 1989, Mr. Carey telephoned the administrative law judge and advised that he had not received a determination in this matter. On April 7, 1989 the administrative law judge mailed a copy of the determination to Mr. Carey at 5 East 78th Street, New York, New York 10021. Mr. Carey received this copy of the determination.

By letter dated November 8, 1989, Maxwell Philipson, Esq., now representing Mr. Carey, wrote to Roberta Moseley Nero, Esq., Secretary to the Tax Appeals Tribunal, seeking "to have the 30 day period for filing an exception waived or excused so that an exception may be filed with the Tax Appeals Tribunal."

On January 9, 1991 petitioners filed a Notice of Exception (Form TA-14) in respect of this matter.

On March 25, 1991 petitioners filed the instant motion and supporting papers.

SUMMARY OF PETITIONERS' POSITION

In his affidavit in support of the motion, Mr. Carey confirms that his request for an adjournment of the October 29, 1987 was based upon his inability to retain counsel to represent him at that hearing. Mr. Carey concedes that his representation by Mr. Mulholland was terminated in June of 1987. Mr. Carey also makes a general allegation that he attempted to obtain other counsel, but offers nothing beyond this general statement. Mr. Carey also indicates in his affidavit that he discussed the question of requesting an adjournment of the October 29, 1987 hearing with "other attorneys familiar with tax appeals" and states that such other attorneys advised him to appear at the October 29, 1987 hearing to request an adjournment, but that if an adjournment was not granted, he should not remain at the hearing.

Petitioners also contend that the administrative law judge's determination is based upon an incomplete and inaccurate record, and that, as a result, this determination contains numerous errors of fact. Petitioners allege that, if the record herein were reopened, they would present "testimony and evidence to ensure a full and complete record upon which a fair and just determination can be arrived at." Petitioners contend that such a full and complete record would be made with the cross-examination of Richard Mackay, the testimony of Mr. Carey, and the testimony of Charles Hamilton, a handwriting expert.

CONCLUSIONS OF LAW

A. The Tax Appeals Tribunal Rules of Practice and Procedure provide that an adjournment of a hearing before an administrative law judge may be granted "where good cause is shown" upon "written request of either party received 15 days in advance of the scheduled hearing date." (See 20 NYCRR 3000.10[b][1].)

B. It is well settled that the granting of an adjournment is a matter within the discretion of the trial court (Matter of Anthony M., 63 NY2d 270, 283, 481 NYS2d 675; People v. Spears,

64 NY2d 698, 485 NYS2d 521; Spodek v. Lasser Stables, 89 AD2d 892, 453 NYS2d 706). The trial court must evaluate whether the party requesting the adjournment is merely seeking to delay resolution of the case or has a legitimate basis for seeking more time (Matter of Bales, 93 AD2d 861, 461 NYS2d 365).

C. Upon review of the affidavit of Mr. Carey and the affirmation of Mr. Philipson I find nothing in the motion papers to support a finding that petitioners had good cause for an adjournment of the October 29, 1987 hearing. I therefore see no basis upon which to reconsider my previous denial of petitioners' adjournment request and no basis upon which to reopen the record herein.

As noted herein, petitioners were granted an adjournment of the hearing scheduled for June 1987 in order to retain new counsel. There is no dispute that Mr. Carey had over four months to retain a lawyer for the October 29, 1987 hearing, but that he failed to do so. Moreover, there is no evidence that he exercised due diligence to find a lawyer during the four-month period. I find Mr. Carey's general statement that he attempted to obtain other counsel unpersuasive, as his affidavit sets forth no details of such alleged attempts. Petitioners thus appeared at the October 29, 1987 hearing and requested an adjournment for the same reason as had been the basis for the adjournment of the June 16, 1987 hearing, having made no apparent efforts to get a lawyer and continue with the administrative proceeding. Mr. Carey was given more than ample time in which to either get a lawyer or proceed as a pro se petitioner. He failed to do either and his failure is no basis upon which to grant a second opportunity to present his case.

D. It is noteworthy that in making his adjournment request at the October 29, 1987 hearing Mr. Carey did not comply with the Tax Appeals Tribunal Rules of Practice and Procedure by putting his request in writing and by making such written request at least 15 days in advance of the hearing (see 20 NYCRR 3000.10[b][1]). It is also noteworthy that Mr. Carey alleges that he was advised by certain attorneys to make his request in the manner that he did and to leave the hearing room upon the denial of the request. Both of these circumstances

indicate less a good faith attempt to gain an adjournment following a diligent effort to obtain new counsel than a calculated effort to delay resolution of the proceeding (Matter of Bales, supra).

E. Mr. Carey's conduct following October 29, 1987 also shows that he was less concerned with obtaining new counsel and having his case heard than with manipulating the system to his advantage. There is no dispute that Mr. Carey took no action with respect to this matter between October 29, 1987 and the date of the issuance of the administrative law judge's determination. Petitioners thus made no effort to open the record prior to the issuance of the determination, even though Mr. Carey was advised at the hearing that the hearing would be continued to conclusion in his absence. Rather, petitioners chose to wait until well after the determination was issued to move to reopen the record. By this questionable tactic, petitioners apparently chose to gamble that the determination might be favorable. In his motion Mr. Carey thus seeks to use the administrative law judge's determination as a guide to justify the reopening of the hearing in which he refused (at least in part) to participate. To grant petitioners' motion at this point and under these circumstances, would surely be a mockery of the administrative process.

F. The length of time between the issuance of the administrative law judge's determination in July 1988 and the November 8, 1989 letter of Mr. Philipson (petitioners' first effort to reopen the record) also supports the conclusion that Mr. Carey is interested less in fairness than in manipulation. As noted, the determination mailed on August 4, 1988 to what is concededly Mr. Carey's home address (5 East 78th Street, New York, New York 10021) was returned to the Division of Tax Appeals "unclaimed". Mr. Carey alleges that he and his wife were "away for the entire summer of 1988." With respect to this allegation, it is at least suspicious that an individual who contends that he could not afford to hire an attorney could afford to be away for an entire summer. Additionally, to explain the period of inaction on this matter between April 7, 1989 (when a copy of the determination was mailed pursuant to Mr. Carey's request) and November 9, 1989 (when Mr. Philipson wrote to Ms. Nero), petitioner

contends that a boating accident in May 1989 resulted in a leg injury which required surgery on June 16, 1989 and which left him "incapacitated for several months". Whether Mr. Carey was in a boating accident is immaterial, but his contention that he was incapacitated is rejected. The records of the Division of Tax Appeals clearly show that on June 7, 1989 he was present at the offices of the Division of Tax Appeals for a hearing in the Matter of Martin T. and Millicent Z. Carey (DTA #802854; ALJ Determination dated February 15, 1990). Mr. Carey in fact testified at the June 7, 1989 hearing. He and Millicent Z. Carey were represented at that hearing by Mr. Philipson. Obviously, petitioner's allegations regarding his incapacitation from the boating accident are, at the very least, erroneous. Indeed, petitioner's blatant error in this point casts aspersions upon the accuracy and credibility of the entirety of petitioner's motion papers.

G. Pursuant to the foregoing discussion, petitioners' motion to reopen the record of the hearing herein to allow for the introduction of evidence regarding the matters at issue is denied with prejudice.

DATED: Troy, New York
January 30, 1992

ADMINISTRATIVE LAW JUDGE